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No. 01-619

In the Supreme Court of the United States

PATRICIA BRAGG, ET AL., PETITIONERS

v.

WEST VIRGINIA COAL ASSOCIATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Eleventh Amendment bars a citizen suit under Section 520(a)(2) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. 1270(a)(2), against the director of a state agency in his official capacity, when that suit alleges that the state official has violated the provisions of a state regulatory program that has been approved by the Secretary of the Interior for the implementation of SMCRA in that State.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 248 F.3d 275. The opinion of the district court denying the state respondent's motion to dismiss two counts for lack of subject matter jurisdiction (Pet. App. 30a-47a) is unreported. The opinion of the district court granting petitioners' motion for summary judgment and a permanent injunction with respect to two counts (Pet. App. 48a-89a) is reported at 72 F. Supp. 2d 642. The opinion of the district court granting a stay of the injunction pending appeal (Pet. App. 90a-93a) is reported at 190 F.R.D. 194.

JURISDICTION

The judgment of the court of appeals was entered on April 24, 2001. Petitions for rehearing were denied on July 13, 2001. The petition for a writ of certiorari was filed on October 11, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Surface Mining Control and Reclamation Act of 1977 (SMCRA) to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations." 30 U.S.C. 1202(a). To achieve those purposes, SMCRA establishes "a program of cooperative federalism that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs." *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 289 (1981); see H.R. Rep. No. 218, 95th Cong., 1st Sess. 57 (1977).

SMCRA is administered for the federal government by the Secretary of the Interior, acting through the Office of Surface Mining Reclamation and Enforcement (OSM). Congress recognized, however, that because of "the diversity in terrain, climate, biologic, chemical, and other physical conditions subject to mining operations," the States should have "primary governmental responsibility" for regulating surface mining "subject to this chapter" (*i.e.*, SMCRA). 30 U.S.C. 1201(f). Accordingly, SMCRA provides that a State may "assume exclusive jurisdiction over the regulation of surface coal mining and reclamation operations" on non-federal lands within its borders by developing a regulatory program meeting the standards of the federal law;

although any such state program must be approved by the Secretary. 30 U.S.C. 1253(a).

To gain the Secretary's approval of its SMCRA program, a State must demonstrate that it "has the capability of carrying out the provisions of this chapter [SMCRA] and meeting its purposes." 30 U.S.C. 1253(a). Among other things, the State must enact a state law "which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of this chapter." 30 U.S.C. 1253(a)(1). The State must further establish a regulatory authority with sufficient personnel and funding "to regulate surface coal mining and reclamation operations in accordance with the requirements of this chapter." 30 U.S.C. 1253(a)(3). Furthermore, the State must enact a "State law which provides for the effective implementation[], maintenance, and enforcement of a permit system, meeting the requirements of this subchapter [of SMCRA] for the regulations of surface coal mining and reclamation operations for coal on lands within the State." 30 U.S.C. 1253(a)(4). No surface mining permit or revision application may be approved by the state regulatory authority under its program unless that authority finds that "all the requirements of this chapter and the State or Federal program have been complied with." 30 U.S.C. 1260(b)(1).

Upon the Secretary's approval of a state regulatory program, the approved program "is codified" in the Code of Federal Regulations in the applicable part assigned to that state. 30 C.F.R. 900. 11, 900.12(a). The final rule as published in the Code of Federal Regulations provides notification of the Secretary's program approval, but does not set out the full text of each State's program. Rather, the state program is available at OSM headquarters and field offices, as well

as at state regulatory authority offices. See 30 C.F.R. 900.12(a).

The Secretary's role under SMCRA does not end once it has approved a State's program. Rather, SMCRA gives the Secretary ongoing responsibility to oversee the effectiveness of a State's implementation of its program, and provides in certain circumstances for direct federal enforcement of state programs in so-called "primacy" States (those States where the Secretary has approved a state SMCRA regulatory program). SMCRA requires the Secretary to conduct "such inspections * * * as are necessary to evaluate the administration of approved State programs" and "to establish procedures to insure that adequate and complete inspections are made." 30 U.S.C. 1267(a) and (h). If the Secretary "has reason to believe that any person is in violation of any requirement of this chapter or any permit condition required by this chapter," and a State with an approved program fails within ten days after notification to take appropriate action or show good cause, the Secretary "shall immediately order Federal inspection of the surface coal mining operation." 30 U.S.C. 1271(a)(1). The Secretary may also conduct an immediate inspection, without notification to the State, upon indication of an imminent harm. 30 U.S.C. 1271(a)(2). The Secretary may issue a federal cessation order where an inspection reveals an imminent danger, 30 U.S.C. 1271(a)(2), and may issue a notice of violation to the operator in a primacy State where a violation, but no imminent harm, is found, 30 U.S.C. 1271(a)(3).

In addition, in the event that the Secretary concludes that a State is not enforcing any part of its regulatory program, OSM may provide "for the Federal enforcement * * * of that part of the State program not being

enforced by such State." 30 U.S.C. 1254(b). Further, if the Secretary finds that a State has not adequately demonstrated its capability and intent to enforce its approved program, the Secretary "shall enforce, in the manner provided by this chapter, any permit condition required under this chapter, shall issue new or revised permits in accordance with [the] requirements of this chapter, and may issue such notices and orders as are necessary for compliance therewith." 30 U.S.C. 1271(b). Finally, the Secretary has authority to revoke approval of a state program and resume direct federal regulation of surface mining within the State. 30 U.S.C. 1254(b).

2. The Secretary approved West Virginia's program to implement SMCRA effective January 21, 1981. 30 C.F.R. 948.10; 46 Fed. Reg. 5915 (1981). The West Virginia program, which is administered by the West Virginia Division of Environmental Protection (WVDEP), includes a so-called "buffer zone" rule designed to protect water courses from the effects of surface mining. That rule was modeled on, but was not identical to, a similar buffer zone regulation of the Department of the Interior. See 30 C.F.R. 816.57.[1] At the pertinent time, the West Virginia program's buffer zone rule provided as follows:

> No land within one hundred feet (100') of an intermittent or perennial stream shall be disturbed by surface mining operations including roads unless specifically authorized by the Director. The Director will authorize such operations only upon finding that surface mining activities will not adversely affect the normal flow or gradient of the

[1] After this case was decided, WVDEP amended its rule to conform more precisely to the federal rule. Those amendments do not affect this case.

> stream, adversely affect fish migration or related environmental values, materially damage the water quantity or quality of the stream and will not cause or contribute to violations of applicable State or Federal water quality standards. The area not to be disturbed shall be designated a buffer zone and marked accordingly.

W. Va. Code St. Reg. tit. 38, § 2-5.2 (2001) (Pet. App. 111a). The Secretary approved the West Virginia buffer zone rule pursuant to final rules issued in 1990 and 1996, noted at 30 C.F.R. 948.15 (Table).

3. This action was brought pursuant to SMCRA's authorization for citizen suits in the federal district courts to compel federal and state officials to comply with provisions of SMCRA and with regulatory programs approved thereunder. That citizen suit provision provides as follows:

> [A]ny person having an interest which is or may be adversely affected may commence a civil action on his own behalf to compel compliance with this chapter—
>
> (1) against the United States or any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution which is alleged to be in violation of the provisions of this chapter or of any rule, regulation, order or permit issued pursuant thereto, or against any other person who is alleged to be in violation of any rule, regulation, order or permit issued pursuant to this subchapter; or
>
> (2) against the Secretary or the appropriate State regulatory authority to the extent permitted by the eleventh amendment to the Constitution

> where there is alleged a failure of the Secretary or the appropriate State regulatory authority to perform any act or duty under this chapter which is not discretionary with the Secretary or with the appropriate State regulatory authority.
>
> The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties.

30 U.S.C. 1270(a).

3. a. In July 1998, petitioners brought this citizen suit under Section 1270(a)(2), asserting claims against the Director of WVDEP in his official capacity and against officials of the United States Army Corps of Engineers. Pursuant to settlements approved by the district court,[2] the parties resolved all claims except two counts against the Director of WVDEP. Under those claims, set forth as Counts 2 and 3 of the complaint, petitioners alleged that the Director had violated nondiscretionary duties by issuing surface mining permits for "mountaintop removal" mining. According to the complaint, mountaintop-removal surface mining results in excess spoil being placed in valleys (a process referred to as "valley fills"), near and in streams, in violation of the West Virginia program's buffer zone rule. Count 2 alleged that the Director of WVDEP engaged in a pattern and practice of issuing permits for valley fills in intermittent and perennial streams without making the findings required by the buffer zone rule. Count 3 alleged that the buffer zone rule does not authorize the Director to permit valley fills that bury substantial portions of intermittent or

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[2] See *Bragg* v. *Robertson*, 83 F. Supp. 2d 713 (S.D. W. Va. 2000); *Bragg* v. *Robertson*, 54 F. Supp. 2d 653 (S.D. W. Va. 1999).

perennial streams. See Pet. App. 82a-83a. The complaint requested declaratory and injunctive relief to enforce the Director's allegedly nondiscretionary duty to deny permit applications that fail to comply with the buffer zone rule.

b. The Director of WVDEP moved to dismiss Counts 2 and 3 on the ground, among others, that those claims were barred by the Eleventh Amendment. See Pet. App. 32a-37a. Petitioners argued that the district court had jurisdiction over those claims under *Ex parte Young*, 209 U.S. 123 (1908), which authorizes federal court suits against state officials seeking prospective relief for violations of federal law. The Director contended, however, that *Ex parte Young* did not allow the present suit because West Virginia's SMCRA program was purely state law (even though it had been approved by the Secretary based on the Secretary's conclusion that it was consistent with SMCRA), and that any citizen suit to require the Director to comply with the West Virginia program would be barred by *Pennhurst State School & Hospital* v. *Halderman*, 465 U.S. 89 (1984).

The district court rejected the Director's Eleventh Amendment argument. Pet. App. 35a-37a. The court held that, while the specific duties that the Director allegedly violated are set forth in the West Virginia code and regulations, the "language and structure of SMCRA demonstrate * * * that these duties under an approved State program, such as West Virginia's, are incorporated into federal law." *Id.* at 35a. The court noted in particular that SMCRA and its implementing regulations provide that, upon approval, States shall administer federally-approved programs in accordance with "the Act" and "this chapter" of federal law (SMCRA itself). *Id.* at 36a. The court also relied on the

Fourth Circuit's decision in *Molinary* v. *Powell Mountain Coal Co.*, 125 F.3d 231, 235-237 (1997), cert. denied, 522 U.S. 1118 (1998), which, although not involving the Eleventh Amendment or a claim against a state official, had ruled that the federal courts had federal-question jurisdiction under 28 U.S.C. 1331 over a SMCRA citizen suit alleging the violation of an approved state program by a private party. Pet. App. 36a.

c. After rejecting the Eleventh Amendment objection, the district court granted summary judgment to petitioners on Count 2, holding that the Director of WVDEP had violated a nondiscretionary duty to make findings required under the state program's buffer zone rule before authorizing valley fills within 100 feet of an intermittent or perennial stream. Pet. App. 83a. The court also granted summary judgment to petitioners on Count 3, finding that the Director had violated a nondiscretionary duty under the buffer zone rule to deny permits for valley fills affecting intermittent and perennial streams. *Id.* at 87a. The court entered a permanent injunction preventing the Director "from further violations of the nondiscretionary duties discussed above and from approving any further surface mining permits under current law that would authorize placement of excess spoil in intermittent and perennial streams for the primary purpose of waste disposal." *Ibid.*

4. On the Director's appeal, the court of appeals vacated the judgment of the district court, and remanded the case with instructions to dismiss Counts 2 and 3 as barred by the Eleventh Amendment, without prejudice to any suit petitioners might file in the West

Virginia state courts. Pet. App. 29a.[3] The court of appeals agreed with the Director that this suit is precluded by *Pennhurst* because it alleges only a violation of state law. *Id.* at 17a-25a.

Rejecting the contention that SMCRA provides for "*shared* regulation of coal mining" between the federal government and the states, Pet. App. 17a, the court of appeals concluded that SMCRA established "a scheme of mutually exclusive regulation by either the U.S. Secretary of the Interior or the State regulatory authority, depending on whether the State elects to regulate itself or to submit to federal regulation." *Id.* at 18a. The court relied principally on 30 U.S.C. 1253(a), which states that, once a state SMCRA regulatory program is approved by the Secretary, the State assumes "exclusive jurisdiction over the regulation of surface coal mining" and reclamation operations. See Pet. App. 9a, 18a-21a. In the court's view, that exclusive-jurisdiction provision reflected a "careful and deliberate" congressional policy to the effect that "the States, not the federal government," are to develop and implement regulatory programs to achieve the purposes of SMCRA. *Id.* at 18a.

The court of appeals acknowledged that "SMCRA does manifest an ongoing federal interest in assuring

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[3] The federal officials named as defendants to petitioners' action also appealed from the district court's injunction, on grounds unrelated to the Eleventh Amendment question presented by the certiorari petition. In light of its conclusion that the Eleventh Amendment barred Counts 2 and 3 entirely, the court of appeals did not reach the issues presented by the federal appellants. In its brief filed in the court of appeals, the federal government agreed with petitioners that the Eleventh Amendment did not bar their citizen suit, and that such a suit could proceed under *Ex parte Young*.

that minimum national standards for surface coal mining are enforced." Pet. App. 18a. For example, it observed that, to ensure achievement of minimum federal standards for surface mining regulation and control, SMCRA permits "limited and ordered federal oversight, grounded in a process that can lead ultimately to the withdrawal of the State's exclusive control." *Id.* at 19a. But, it stated, "[u]ntil that withdrawal occurs, * * * the minimum national standards are attained by State enforcement of its own law." *Ibid.*

The court of appeals also contrasted SMCRA's provision for "exclusive" state jurisdiction over regulation of surface mining in primacy states with 30 U.S.C. 1254(a), which provides that the Secretary shall promulgate and implement a federal program if a State fails to submit an acceptable program or fails to implement, enforce, or maintain an approved program. See Pet. App. 18a. The court understood SMCRA to provide for "either State regulation of surface coal mining within its borders or federal regulation, but not both," and that "one or the other is exclusive * * * with the exception that an approved State program is always subject to revocation when a State fails to enforce it." Pet. App. 9a. Thus, the court concluded, "[b]y giving States exclusive regulatory control through enforcement of *their own* approved laws, Congress intended that the federal law establishing minimum national standards would 'drop out' as operative law and that the State laws would become the sole operative law." *Id.* at 20a.

Based on its determination that state SMCRA programs, like West Virginia's, that have been approved by the Secretary are purely state law in character, the court of appeals held that any injunction by a federal court against a state official to enforce a provision of a state SMCRA program (such as the State's buffer zone

rule at issue here) would contravene the Eleventh Amendment. Pet. App. 21a-25a. The court acknowledged that the federal interest in adjudicating the dispute in this case is "undoubtedly stronger" than was the case in *Pennhurst*, because "the rights at issue [in this case] were created by the State pursuant to a federal invitation to implement a program that met certain minimum standards set by Congress." *Id.* at 22a. In addition, the court noted that "the federal government, through the Secretary's oversight role, retains an important modicum of control over the enforcement of that State law." *Id.* at 22a-23a. Nevertheless, the court found that an order against the Director in this case requiring him to comply with state law would infringe the "dignity and respect afforded a State" as well as the States' "unique interest in the enforcement of their own law." *Id.* at 23a-24a (citation omitted). The court also observed that West Virginia has enacted a similar citizen suit provision giving affected individuals the right to sue in state court to compel the Director to comply with the State's SMCRA program. *Id.* at 24a. Accordingly, the court was of the view that "the federal interest in maintaining the State's compliance with its own program may be fulfilled via suit in [state court], in a manner that does not offend the dignity of the State." *Ibid.*

ARGUMENT

The court of appeals' Eleventh Amendment ruling in this case does not warrant this Court's review at this time. That decision is, indeed, in tension with other appellate decisions concerning citizen suit provisions against state officials under other federal statutes, and with decisions holding that approved state programs under SMCRA have a federal-law character. But no

other court of appeals or state supreme court has decided the precise issue that was before the lower court in this case—namely, whether a citizen suit under SMCRA in federal court to compel a state official to perform a nondiscretionary duty under a state SMCRA program that has been approved by the Secretary of the Interior is barred by the Eleventh Amendment. Accordingly, further review of this case is not warranted.

1. a. The basic premise of the court of appeals' decision is that, once the Secretary approves a State's SMCRA plan, the regulation of surface mining in that State becomes exclusively a matter of state law, and federal law "drops out" entirely. See Pet. App. 9a. That premise rests on a fundamental misunderstanding of SMCRA. Several provisions of SMCRA demonstrate that, even after a State, pursuant to the Secretary's approval of its SMCRA plan, assumes responsibility for regulating surface mining under SMCRA, that regulation retains a significant federal character, and state officials retain federal duties under SMCRA in implementing their state programs. Consequently, a citizen suit to enforce the terms of a state SMCRA plan is not barred by *Pennhurst*.

First, for a State to gain the Secretary's approval to administer SMCRA, the State must demonstrate that it "has the capability of *carrying out the provisions of this chapter* and meeting its purposes." 30 U.S.C. 1253(a) (emphasis added). Among other things, the State must enact a law "which provides for the regulation of surface coal mining and reclamation operations *in accordance with the requirements of this chapter*." 30 U.S.C. 1253(a)(1) (emphasis added). The State must further establish a regulatory authority with sufficient personnel and funding "to regulate surface coal mining and

reclamation operations *in accordance with the requirements of this chapter.*" 30 U.S.C. 1253(a)(3) (emphasis added). To do so, the State must establish a permit program sufficient for "*meeting the requirements of this subchapter* for the regulations of surface coal mining and reclamation operations." 30 U.S.C. 1253(a)(4) (emphasis added). Finally, the State must establish "rules and regulations consistent with regulations issued by the Secretary *pursuant to this chapter.*" 30 U.S.C. 1253(a)(7) (emphasis added). Those provisions all demonstrate that the basic function of a state SMCRA program approved by the Secretary is to implement "this chapter" of federal law—that is, SMCRA.

Of particular relevance here, Section 510(b)(1) of SMCRA, which is part of SMCRA's requirements governing the issuance of permits for surface mining operations, provides that no permit or revision application shall be approved unless the appropriate state or federal regulatory authority finds "that all the requirements of this chapter and the State or Federal program have been complied with." 30 U.S.C. 1260(b)(1). Thus, *federal* law—namely, SMCRA itself—precludes a state regulatory authority from issuing a permit that does not comply with a State's program that has been approved by the Secretary to implement SMCRA. The fact that a particular requirement is codified in state law does not alter the fact that *federal* law mandates that state officials adhere to that requirement, and that *federal* law is violated if a state official fails to do so. Although the district court recognized that States with approved SMCRA programs have an obligation rooted in federal law to ensure that surface mining operations comply with the terms of the approved state programs (see Pet. App. 82a-83a), the court of appeals failed to apprehend that point, and stated, incorrectly, that,

"[b]ecause [Section 1260] establishes minimum standards that have been adopted by West Virginia and approved by the Secretary, * * * any violation of this standard involves State law, not federal law" (*id.* at 21a).

SMCRA also makes clear that, even after the Secretary has approved a state program, the Secretary retains substantial, ongoing responsibility to enforce the terms of that program. For example, Section 521(a)(1) of SMCRA provides that, where the Secretary has reason to believe that any person is in violation of any requirement of SMCRA "or any permit condition required by this chapter," and a State with an approved program fails within ten days after notification to take appropriate corrective action or show good cause, the Secretary "shall immediately order Federal inspection of the surface coal mining operation." 30 U.S.C. 1271(a)(1). The Secretary may then issue to the operator a notice of violation, 30 U.S.C. 1271(a)(3), or, in the case of an imminent danger, a cessation order, 30 U.S.C. 1271(a)(2). In addition, Section 504(b) of SMCRA, titled "Federal enforcement of State program," provides that, in the event that a State is not enforcing any part of its approved program, "the Secretary may provide for the Federal enforcement, under the provisions of section 1271 of this title [SMCRA Section 521], of *that part of the State program not being enforced by such State.*" 30 U.S.C. 1254(b) (emphasis added). Finally, SMCRA Section 521(b), titled "Inadequate State enforcement; notice and hearing," provides that, if the Secretary finds that a State has not adequately demonstrated its capability and intent to enforce its approved program, the Secretary "shall enforce, in the manner provided by this chapter, any permit condition required under this chapter, shall issue new or revised permits in

accordance with [the] requirements of this chapter, and may issue such notices and orders as are necessary for compliance therewith." 30 U.S.C. 1271(b).

Thus, by SMCRA's express terms, the Secretary has the continuing authority and responsibility to enforce the requirements of an approved state program directly if the State fails to do so. Of paticular relevance here, those provisions make clear that state officials have a federal duty to comply with permitting requirements under the state plan. They rest on Congress's understanding that the terms of approved state programs would be federal in character and therefore could be enforced against private parties by a federal regulatory agency. And they demonstrate that the Secretary's authority to ensure compliance with SMCRA is *not* limited, as the court of appeals suggested, to revoking federal approval of a State's SMCRA plan if the Secretary finds that the State's enforcement of SMCRA has been ineffective. See Pet. App. 9a, 21a.

Indeed, SMCRA's citizen suit provisions themselves demonstrate that approved state SMCRA programs have a federal character that permits their enforcement in federal court as federal law. The citizen suit provision at issue here rests on the assumption that a state official's alleged failure to comply with an approved state SMCRA program presents a federal question, for that provision expressly authorizes a suit in federal court against the "appropriate State regulatory authority" (to the extent permitted by the Eleventh Amendment) "where there is alleged a failure of the * * * appropriate State regulatory authority" to perform a nondiscretionary duty. 30 U.S.C. 1270(a)(2). If, as the court of appeals believed, a state official's compliance with an approved state SMCRA program could never implicate an issue of federal law, it would be

difficult to understand why Congress would have authorized citizen suits in federal court against state officials. Congress similarly authorized a suit for damages in federal court against a surface mining operator at the behest of any person who is harmed by the operator's violation of "any rule, regulation, order, or permit issued pursuant to this [Act]"—necessarily including such rules, regulations, orders, and permits issued by state regulatory authorities under approved state SMCRA programs. 30 U.S.C. 1270(f). That cause of action, too, rests on Congress's understanding that the violation of an approved state SMCRA program presents a question of federal law.[4]

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[4] Indeed, the court of appeals reached that very conclusion in *Molinary* v. *Powell Mountain Coal Co.*, 125 F.3d 231 (4th Cir. 1997), cert. denied, 522 U.S. 1118 (1998). The district court in this case relied on *Molinary* in holding that violations of state SMCRA programs by state officials arise under federal law and are therefore enforceable under *Ex parte Young* (see Pet. App. 36a-37a). In *Molinary*, landowners brought suit against a private surface mining operator under Section 1270(f), alleging that the operator had failed to comply with certain Virginia SMCRA regulations that had been approved by the Secretary. The operator moved to dismiss on the ground that provisions of an approved state SMCRA program are not issued "pursuant to this chapter" (SMCRA), and that federal courts consequently lack jurisdiction over private damages actions against surface mining operators in States with approved programs. 125 F.3d at 233-236. The court of appeals rejected that argument. It held that a federal cause of action exists under Section 1270(f) to enforce the terms of an approved state SMCRA program against a surface mining operator, and that federal question jurisdiction over such a suit rests on 28 U.S.C. 1331. See 125 F.3d at 236-237. The court stated that, "once the Secretary approves a state surface coal mining and reclamation program, the rules, regulations, orders, and permits

b. The understanding that approved state SMCRA programs have a federal as well as a state character is reflected in the Secretary's regulations implementing SMCRA and in the Secretary's longstanding interpretation of SMCRA. The Secretary's regulations provide that, upon the Secretary's approval of a state SMCRA program, the program is "codified" in a part of the Code of Federal Regulations reserved for that purpose. See 30 C.F.R. 900.12(a). In addition, 30 C.F.R. 900.12(b) provides that the "[p]rovisions of approved State regulatory programs or permits issued pursuant to an approved State regulatory program may be enforced by the Secretary." The Secretary explained, in issuing those regulations, that 30 C.F.R. 900.12(b) "provides notice to the public that the Secretary may enforce provisions of the Act or conditions of permits issued pursuant to State programs," and the rule "will allow the Secretary to take direct and immediate enforcement action." 48 Fed. Reg. 6333 (1983).

Since the Department of the Interior's first substantive rulemaking 22 years ago implementing a permanent regulatory program, the Secretary has consistently read SMCRA to provide that a state SMCRA program approved by the Secretary is federal

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issued under that program are 'issued,' in the language of [Section 1270(f)], 'pursuant to' SMCRA." *Id.* at 236.

In the decision below, the court of appeals did not address *Molinary*, except to state that "[i]t is now settled that 30 U.S.C. § 1270 confers on federal district courts subject matter jurisdiction over at least some sorts of claims." Pet. App. 27a. But see *Haydo* v. *Amerikohl Mining, Inc.*, 830 F.2d 494, 496-498 (3d Cir. 1987) (holding, contrary to *Molinary*, that federal courts lacked jurisdiction over SMCRA damages action brought against private operators based on alleged violations of the approved Pennsylvania SMCRA program).

as well as state in character. In 1979, the Secretary issued final rules that included a requirement, set forth at 30 C.F.R. 778.14, that permit applicants must provide information concerning compliance history under SMCRA and other statutes. The Secretary promulgated that regulation in part to implement SMCRA Section 510(c), which provides that an applicant shall file a schedule listing all notices of violation "of this chapter" in connection with any surface coal mining operation in the prior three years. 30 U.S.C. 1260(c). The preamble to the rule, citing expressly to the SMCRA citizen suit provision at issue here, states as follows:

> [SMCRA]'s State programs, while adopted in the first instance by the States, will also become Federal law when approved by the Secretary of Interior, being promulgated as Federal regulations and enforceable as such in the United States courts. Section 520(a) SMCRA; 30 U.S.C. Section 1270(a).

44 Fed. Reg. 15,023 (1979).

The Secretary reiterated those principles in 1988 in promulgating amendments to the rules relating to federal inspections and notices of violation in primacy states, pursuant to Section 521(a). 53 Fed. Reg. 26,737 (1988). In explaining that a purpose of the rulemaking was to provide a rational process to resolve disagreements and avoid unnecessary issuance of federal notices of violation in primacy States, the preamble stated that, "[w]hile adopted in the first instance by a state, a state program becomes Federal law when approved by the Secretary and promulgated as Federal regulation." *Ibid.*

c. The court of appeals gave dispositive weight to the fact that a State that wishes to obtain "exclusive"

jurisdiction over the regulation of surface coal mining and reclamation operations in the State shall submit a state program to the Secretary for approval. 30 U.S.C. 1253(a); see Pet. App. 17a-19a (relying on this language to distinguish SMCRA from other "cooperative federalism" statutes). The court of appeals, however, ascribed excessive significance to the single word "exclusive" in that introductory sentence of one subsection of SMCRA. That word plainly does not manifest an intent on the part of Congress that approved state programs implementing SMCRA would have no federal character and would be the exclusive responsibility of the State to enforce. Such a conclusion would be inconsistent with numerous other provisions of SMCRA discussed above (pp. 2-3, 4-5, 13-19, *supra*), which demonstrate that, after such a state program has been approved, state officials have a federal duty to comply with the permitting requirements of both SMCRA and the state plan, and that compliance by state officials (and private surface mining operators) with the requirements of the approved state SMCRA programs presents issues of federal law.

It is more consistent with SMCRA to construe Section 1253(a) as merely confirming that, "[a]s long as the state properly enforces its approved program, it is the exclusive 'on the scene' regulatory authority." *In re Permanent Surface Mining Regulation Litig.*, 653 F.2d 514, 519 (D.C. Cir.) (en banc), cert. denied, 454 U.S. 822 (1981). Thus, the States, and not the federal government, issue permits and monitor compliance with the permits once a state program has been approved. But that general proposition is subject to the key qualification noted by the D.C. Circuit: "[a]s long as the state properly enforces its approved program." *Ibid.* It is precisely the function of the citizen suit provision at

issue here to ensure that the State does properly enforce its approved program, and the question whether a State is properly enforcing its program is a federal question within the jurisdiction of the federal courts.

Accordingly, the allegations raised by Counts 2 and 3 of petitioners' complaint, to the effect that the Director of WVDEP has failed to comply with alleged non-discretionary duties under the West Virginia SMCRA program, are not barred by the Eleventh Amendment, but are cognizable in federal court under *Ex parte Young*. Those counts put at issue whether state officials have properly enforced a program designed to implement a federal statute, which was approved by the Secretary based on the State's representation and showing that the program complied with and would provide for the adequate enforcement of federal law, and which itself is directly enforceable by the Secretary if the state fails to enforce the program adequately. The structure of SMCRA makes clear that those counts raise federal questions that fall within the jurisdiction of the federal courts.

2. Although the court of appeals' Eleventh Amendment ruling in this case is incorrect, further review of that ruling is not warranted at this time. No other court of appeals has yet addressed whether the Eleventh Amendment bars a SMCRA citizen suit against a state official alleging the violation of provisions of an approved state plan. Thus, the decision below does not conflict directly with the decision of any other court of appeals.[5]

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[5] The same Eleventh Amendment issue is now pending before the Third Circuit in *Pennsylvania Federation of Sportsmen's Clubs* v. *Seif*, Nos. 00-2139 and 01-1683. Briefing in that case was completed in November 2001. No argument date has been set.

Petitioners argue that the decision below is inconsistent with the D.C. Circuit's en banc decision in *In re Permanent Surface Mining Regulation Litig.*, *supra*, in which that court stated that, after the Secretary has approved a state SMCRA program, the public has "the right to sue in federal court, to compel compliance with the state program and its permits." 653 F.2d at 519 (citing 30 U.S.C. 1270). That case, however, did not directly involve SMCRA's citizen suit provision or the Eleventh Amendment; rather, the issue before the court was whether the Secretary has the authority to require that States' SMCRA programs comply with federal regulations implementing SMCRA as well as with the statute itself. See *id.* at 521-527.

Nor, contrary to petitioners' contention, does the decision below conflict with decisions of the West Virginia Supreme Court concerning West Virginia's SMCRA program (see Pet. 29-30). In those decisions, the West Virginia Supreme Court held that, under the Supremacy Clause of the United States Constitution, a state SMCRA program that is inconsistent with a requirement of SMCRA may not be enforced, and that state officials responsible for administering the state program must comply with more stringent provisions of SMCRA and federal regulations where applicable. See *DK Excavating, Inc.* v. *Miano*, 549 S.E.2d 280, 284-285 (W. Va. 2001); *Canestaro* v. *Faerber*, 374 S.E.2d 319, 321 (W. Va. 1988); see also 30 U.S.C. 1255(a) and (b) (providing that any state law or regulation that is inconsistent with SMCRA is superseded by SMCRA, unless the state law is more stringent than SMCRA). The West Virginia Supreme Court had no occasion to consider whether a suit to compel state officials' compliance with a state SMCRA program could proceed in federal court under *Ex parte Young*.

Petitioners also argue (Pet. 23-28) that the decision below conflicts with decisions recognizing the federal character of state requirements under other "cooperative federalism" statutes. It is correct that there is tension between the decision below and some of those other decisions, which hold or at least recognize that there is a federal character to state programs designed to implement federal statutes and approved by a federal agency.[6] There is, however, no direct conflict

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[6] See *Ashoff* v. *City of Ukiah*, 130 F.3d 409, 411 (9th Cir. 1997) (holding that citizen suit provision of Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6972(a)(1)(A), authorizes suits after the State has adopted a RCRA program, because "federal criteria give the state standards legal effect under federal law"); *Natural Res. Def. Council* v. *California Dep't of Transp.*, 96 F.3d 420, 424 (9th Cir. 1996) (recognizing that Congress intended, under Clean Water Act, 33 U.S.C. 1365, "to authorize citizens to bring *Ex parte Young* suits against state officials with the responsibility to comply with clean water standards and permits"); *American Lung Ass'n* v. *Kean*, 871 F.2d 319, 322-325 (3d Cir. 1989) (holding that, under citizen suit provision of Clean Air Act, 42 U.S.C. 7604, district court has jurisdiction over citizen suit to compel state officials to enact regulatory scheme to which the State had committed itself); *David D.* v. *Dartmouth Sch. Comm.*, 775 F.2d 411, 419 (1st Cir. 1985) (recognizing that terms of state plan to provide free appropriate education for handicapped children, implementing Education of the Handicapped Act (EHA), 20 U.S.C. 1400 *et seq.*, are enforceable in either federal or state court), cert. denied, 475 U.S. 1140 (1986); *Geis* v. *Board of Educ.*, 774 F.2d 575, 581 (3d Cir. 1985) (holding that federal court has jurisdiction over action to enforce state regulations to implement EHA, because "federal law incorporates by reference requirements established by state law"); *Friends of the Earth* v. *Carey*, 535 F.2d 165, 173 (2d Cir. 1976) (recognizing that citizen suit under Clean Air Act may be brought against state officials to enforce terms of state implementation plan), cert. denied, 434 U.S. 902 (1977); see also *Arkansas* v. *Oklahoma*, 503 U.S. 91 (1992) (holding in interstate context that EPA Clean Water Act regulation effectively incorporates into federal

between those decisions and the decision below. In particular, none of those other appellate decisions concerned a federal statute that contains language similar to the language in 30 U.S.C. 1253(a), on which the court of appeals placed such great emphasis in this case, providing that a state has "exclusive jurisdiction" to regulate once the federal government has approved the state's plan. See pp. 10, 19-20, *supra*. Therefore, while the court of appeals may have erred in relying on that language in SMCRA to rule that this action is barred by the Eleventh Amendment, it nonetheless remains the case that the court below found that language to be the crucial feature distinguishing SMCRA from other cooperative-federalism statutes, including other environmental statutes. In the absence of any other federal appellate decision considering Eleventh Amendment issue presented here under SMCRA, there is presently no conflict in the courts of appeals warranting this Court's review of that issue.

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law those state-law water-quality standards that EPA reasonably determines to be applicable and requiring courts to defer to EPA's reasonable interpretation of those standards); *Espinosa* v. *Roswell Tower, Inc.*, 32 F.3d 491, 492 (10th Cir. 1994) (stating that a state implementation plan approved by EPA under Clean Air Act "has the force and effect of federal law, thereby permitting the Administrator to enforce it in federal court"); *Her Majesty the Queen* v. *City of Detroit*, 874 F.2d 332, 335 (6th Cir. 1989) (stating that, "[i]f a state implementation plan ("SIP") [the Clean Air Act] is approved by the EPA, its requirements become federal law and are fully enforceable in federal court"). Petitioner also cites (Pet. 26) *EPA* v. *California*, 426 U.S. 200, 224-225 (1976), for the proposition that conditions in discharge permits issued under state Clean Water Act programs are enforceable in federal court citizen suits. While we agree with that proposition, we do not read the cited discussion in that case as establishing that rule.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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